

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[illegible]

1 the Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain
2 judicial review of a final decision of the Commissioner of the
3 Social Security Administration (Commissioner) denying her
4 application for Supplemental Security Income (SSI) benefits.

5 **Procedural Background**

6 Ms. Harvey filed an application for SSI benefits on August 7,
7 2001, alleging disability on the basis of low intellectual
8 functioning, learning disabilities, and psychological disorders.
9 Her application was denied initially and upon reconsideration. On
10 December 12, 2002, a hearing was held before an Administrative Law
11 Judge (ALJ). On February 13, 2003, the ALJ issued his decision
12 finding Ms. Harvey not disabled. The Appeals Council denied Ms.
13 Harvey's request for review, making the ALJ's decision the final
14 decision of the Commissioner.

15 **Factual Background**

16 Born September 28, 1959, Ms. Harvey was 43 years old at the
17 time of the ALJ's decision. She has a 10th grade education. Although
18 the ALJ found that Ms. Harvey had past relevant work as a server,
19 factory worker, bus person, cashier/cook, and child care helper,
20 the finding is unsubstantiated by the record, which shows no
21 earnings at the substantial gainful activity level.

22 A job qualifies as past relevant work only if it involved
23 substantial gainful activity. Lewis v. Apfel, 236 F.3d 503, 515 (9th
24 Cir. 2001); 20 C.F.R. §§ 404.1560, 404.1565, 416.960, 416.965.
25 Substantial gainful activity is work done for pay or profit that
26 involves significant mental or physical activities. 20 C.F.R. §§

1 404.1571-404.1572, 416.971-416.975. Earnings can be a presumptive,
2 but not conclusive, sign of whether a job is substantial gainful
3 activity. Lewis, 236 F.3d at 515. Monthly earnings averaging less
4 than \$300 generally show that a claimant has not engaged in
5 substantial gainful activity. 20 C.F.R. §§ 404.1574(b)(3),
6 416.974(b)(3).

7 The ALJ found no evidence that Ms. Harvey had engaged in any
8 substantial gainful activity since January 29, 1996, her alleged
9 disability onset date. Ms. Harvey's earnings record prior to 1996
10 reveals that she never achieved average monthly earnings of \$300 or
11 more; her highest annual income was \$2,406 in 1989. Tr. 62.
12 Moreover, there is no evidence in the record that Ms. Harvey has
13 ever worked more than five months at any job; this was as a child
14 care worker. Her work as a server comprised a few days; her work as
15 a factory worker, cashier/cook, and bus person comprised one to
16 three months. Tr. 94, 160. Accordingly, the court rejects the
17 Commissioner's summary of the evidence with respect to past
18 relevant work.

19 **Medical Evidence**

20 On June 24, 1997, Ms. Harvey had a psychiatric evaluation by
21 Elliot Harris, M.D., D.O. After an interview, Dr. Harris concluded
22 that Ms. Harvey had "absolutely no insight into her problems," and
23 that she stated she had never seen a psychotherapist before and
24 "has really no idea as to what she is supposed to do or receive
25 here." Tr. 141. Dr. Harris noted that her affect was flat and her
26 thought process was "slow to dull," but there were no abnormalities

1 of thought process or content, except for slowness in her response
2 to questions. Id. She was at that time seeing a therapist on a
3 weekly basis, and Dr. Harris decided not to add medication. Id. His
4 diagnosis was adjustment reaction of adult life with depressive
5 quality and learning disability. He assigned a Global Assessment of
6 Functioning (GAF) of less than 40.¹ Id.

7 Dr. Harris's opinion was that Ms. Harvey had a "long-standing
8 personality deficit, augmented by her learning disability" and that
9 the prognosis for any change was poor. Tr. 142. He observed, "I
10 don't think she will be able to get any job that will give her a
11 living wage that would be above the barest of minimal." Id.

12 On September 16, 1997, Dr. Harris noted that Ms. Harvey was
13 having problems with her 16 year old son, who was violent and
14 attacked her, but she had "no insight into how to handle it." Tr.
15 138. Dr. Harris wrote, "She acts as though her cognition and mental
16 capacity are impaired. Her affect is slightly flat and she laughs
17 and giggles at inappropriate times." Id. Dr. Harris ordered
18

19 ¹ The GAF is used by mental health professionals to assess
20 psychological, social and occupational functioning. A GAF between
21 31 and 40 indicates major impairment in several areas. A GAF
22 between 41 and 50 indicates serious symptoms or any serious
23 impairment of functioning, including being unable to keep a job.
24 A GAF between 51 and 60 indicates moderate symptoms and moderate
25 difficulty in functioning. Diagnostic and Statistical Manual of
26 Mental Disorders, Fourth Edition (1994) (DSM-IV) at 32.

1 psychological testing because he thought her I.Q. and cognitive
2 status might be impaired. Id. Dr. Harris thought she should apply
3 for SSI, because she had "no ability to make decisions for
4 herself." Id.

5
6 On October 14, 1997, Dr. Harris noted that Ms. Harvey's lab
7 results showed her to be "profoundly hypothyroid." Tr. 137. Dr.
8 Harris noted that he had thought Ms. Harvey's dullness was due to
9 organicity, as she was quite concrete, very slow to grasp
10 situations, unaware of what was going on, and responded very
11 slowly. Id.

12 On November 25, 1997, Ms. Harvey was given a psychological
13 evaluation by Lewis M. Etcoff, Ph.D. Tr. 123-130. Ms. Harvey
14 presented with an extremely flat and blunted affect, and was very
15 lethargic. Tr. 123. She tended to process verbal information
16 extremely slowly, to the point that she "often appeared to have
17 difficulty understanding what was being communicated to her, and
18 was subsequently very slow to respond." Id. Her speech was slow and
19 she appeared confused a great deal of the time. Id. at 123-24.
20 Although she was "very cooperative," she tended to be a poor
21 historian, and at times had difficulty answering questions. Tr.
22 124.

23 Ms. Harvey reported that she was currently under treatment for
24 hypoglycemia and severe hypothyroidism, for which she was taking
25 Synthroid. Tr. 124. She denied any significant history of emotional
26 difficulties, stating that she began seeing a therapist at Mojave
27

1 Mental Health in February 1997 because of difficulties with her
2 mother and son, with whom she was living. Tr. 125. She denied
3 taking any psychotropic medications, but admitted that she did
4 sometimes hear voices. Id. Ms. Harvey told Dr. Etcoff that her
5 longest period of employment was about five or six months when she
6 worked at a day care center. Id.

7 Ms. Harvey described herself as significantly depressed from
8 time to time, which she attributed to loneliness. Id. However, she
9 denied suicidal ideation or previous attempts or any history of
10 physical harm to herself. Id. She also described herself as a
11 nervous person, especially around people she did not know, being
12 shy and having trouble relating to other people. Id.

13 Dr. Etcoff administered a brief form of the Wechsler Adult
14 Intelligence Scale - Revised (WAIS-R). She obtained a Verbal IQ of
15 76, falling into the borderline range with respect to language
16 skills. Tr. 126. She exhibited deficits in a number of areas: her
17 general fund of information was less than that of 95% of adults her
18 age; her reasoning skills were measured at the 9th percentile, and
19 she showed low-average attention and concentration abilities. Id.

20 Her Performance IQ score was 78, also in the borderline range.
21 Id. She had significant difficulty with visual organization and was
22 often unable to differentiate essential from nonessential details,
23 even though she "seemed to give great thought to each picture" on
24 the Picture Completion Subtest. Id. Her visual-spatial abilities
25 fell in the low-average range, at the 16th percentile. On the Digit
26 Symbol Subtest, a measure of visual-motor coordination and clerical

1 processing speed, she performed in the below-average range and at
2 the 5th percentile. Id. Ms. Harvey's Full Scale IQ was 76, in the
3 borderline range. Tr. 127.

4 Ms. Harvey was also administered the Wide Range Achievement
5 Test - 3 (WRAT -3). Her reading, spelling and vocabulary were at
6 the high school level. Id. Dr. Etcoff wrote,

7 Although Ms. Harvey's performance on academic tests
8 measuring reading, spelling, and vocabulary would seem
9 inconsistent with her borderline intellectual
10 functioning, this is in fact not the case because as long
11 as one can process visual information effectively and has
12 decent phonics skills which Ms. Harvey does, it is not
13 impossible for an individual functioning at this level to
14 acquire basic reading, spelling, and vocabulary skills.

15 Id. On the Arithmetic Subtest of the WRAT - 3, Ms. Harvey fell into
16 the fifth percentile, at a fifth grade level. Id.

17 Ms. Harvey was given the Trail Making Test, Parts A and B, a
18 measure of attention and concentration and cognitive flexibility.
19 Her performance was very poor and indicative of mild to moderate
20 attentional impairment. On the Stroop Color-Word Test, her
21 performance on the easiest portion of the test fell below the first
22 percentile. Id. In Dr. Etcoff's opinion, her performance on the
23 Trail Making Test and the Stroop Color-Word Test suggested that her
24 attentional skills were very poor and might have been indicative of
25 "some kind of neurological impairment." Tr. 128.

26 Ms. Harvey's personality test results showed elevated clinical
27 personality scales (dependent, self-defeating, avoidant and
28 passive/aggressive) and two of the severe personality pathology
scales were elevated (borderline and paranoid). However, the Major
Depression Scale yielded a T-Score of zero.

1 Dr. Etcoff's diagnoses were borderline intellectual
2 functioning, dependent personality disorder, avoidant personality
3 traits, and borderline personality traits; he gave rule-out
4 diagnoses of dysthymic disorder, generalized anxiety disorder,
5 cognitive disturbance due to hypothyroidism and mathematics
6 disorder. He concluded:

7 Ms. Harvey presents as a woman who has severe cognitive
8 deficits that may or may not be neurological in origin.
9 ... Ms. Harvey clearly suffers from a limited
intellectual capacity. Therefore, her ability to reason
effectively and use good judgment is seriously impaired.

10 Tr. 129. Dr. Etcoff recommended a complete neurological workup to
11 determine whether there was any physical evidence of organicity.

12 Tr. 130. He concluded,

13 It strikes me that there is reason to be concerned about
14 Ms. Harvey's well-being in the event that she one day
15 does not have family members to rely on for support. It
16 is my opinion that she will be in need of services of
some kind due to the fact that she will not likely be
able to hold down a job and function unassisted in the
community.

17 Id.

18 Dr. Harris saw Ms. Harvey and her caseworker on a monthly
19 basis between July 1997 and March 1998. Tr. 131-140. On December
20 11, 1997, Dr. Harris noted that Dr. Etcoff's diagnosis was
21 consistent with Dr. Harris's diagnosis of borderline intellectual
22 functioning and probable dysthymia. Dr. Harris wrote, "There is no
23 doubt in my mind that this patient functions at a low intellectual
24 capacity. ... " Tr. 134.

25 In April 2001, Ms. Harvey began receiving outpatient
26 counseling for anxiety disorder from Colin Wood, M.S.W., at Mid-
27 Columbia Center for Living. Tr. 249-285. Physician's assistant

1 Jenny Harris prescribed Celexa for depression and anxiety. Tr. 288-
2 291. Ms. Harvey continued to receive medication for hypothyroidism.
3 Tr. 250.

4 On June 12, 2001, Ms. Harvey had a vocational assessment from
5 Sandra Gettman at Columbia Gorge Community College. Tr. 160. Ms.
6 Gettman concluded that Ms. Harvey would benefit from an assisted
7 job placement, and found that she could do work that had a
8 sequential, set routine, without having to make decisions and being
9 able to move around; that she would be unable to rely on verbal
10 instruction, so that the job could not be dependent on her oral or
11 written expression; and that she was unable to do work that was
12 time pressured. Tr. 163.

13 On July 31, 2001, Ms. Harvey was given a psychological
14 assessment by Jana Zeedyk, Ph.D. Tr. 166-171. Dr. Zeedyk thought
15 Ms. Harvey showed occasional latencies in her speech, appeared
16 "perplexed by some questions," and needed a "fair amount of time to
17 formulate an answer once she did understand questions." Tr. 168.

18 Dr. Zeedyk administered the WAIS-III. Ms. Harvey obtained a
19 Verbal IQ score of 64, a Performance IQ score of 70, and a Full
20 Scale IQ of 64. These scores indicated that she was currently
21 operating in the mildly mentally retarded range for verbal skills
22 (first percentile), the borderline range for performance skills
23 (second percentile) and the mildly mentally retarded range for
24 intellectual functioning overall (first percentile). Tr. 169.

25 Dr. Zeedyk observed that Ms. Harvey worked consistently until
26 she reached her ability ceiling, so that she concluded that the
27

1 testing gave a reasonable estimate of Ms. Harvey's current level of
2 functioning. Id. Ms. Harvey's WAIS -III Index Scores showed verbal
3 comprehension at the mildly mentally retarded level (first
4 percentile); perceptual organization at the borderline level (third
5 percentile); working memory at the mildly mentally retarded level
6 (second percentile) and processing speed at the borderline level
7 (third percentile).

8 Dr. Zeedyk diagnosed adjustment disorder with depressed mood
9 and mild mental retardation. She assigned Ms. Harvey a Global
10 Assessment of Functioning (GAF) score of 45, noting, "limitations
11 in functioning due to relatively low intellectual functioning." Tr.
12 171.

13 On September 27, 2001, Social Security reviewing psychologist
14 Dorothy Anderson, Ph.D. completed a Psychiatric Review Technique
15 form. Tr. 211. Dr. Anderson agreed with Dr. Zeedyk's diagnoses of
16 adjustment disorder with depressed mood and mild mental
17 retardation. Id. Dr. Anderson concluded that Ms. Harvey had
18 moderate limitations in maintaining social functioning and
19 concentration, persistence or pace. Tr. 221.

20 Dr. Anderson also completed a Residual Functional Capacity
21 Assessment and found that Ms. Harvey had marked limitations in the
22 ability to understand and remember detailed instructions and to
23 carry out detailed instructions. Tr. 225. She found that Ms. Harvey
24 had a moderately limited ability to interact appropriately with the
25 general public. Tr. 226.

26 On October 24, 2001, Peter LeBray, Ph.D. also a reviewing
27

1 psychologist for Social Security Administration, completed a
2 Psychiatric Review Technique form. Dr. LeBray disagreed with the
3 mild mental retardation diagnosis in favor of borderline IQ. Tr.
4 230. However, he agreed that Ms. Harvey also had an adjustment
5 disorder with depressed mood. Tr. 232.

6 Dr. LeBray agreed with Dr. Anderson that Ms. Harvey had
7 moderate difficulty in maintaining social functioning and
8 maintaining concentration, persistence and pace, tr. 239, and
9 agreed that she had marked limitations in the ability to
10 understand, remember and carry out detailed instructions and
11 moderate limitations in the ability to interact appropriately with
12 the general public. He disagreed with Dr. Anderson in finding that
13 she also had moderate limitations in her ability to respond
14 appropriately to changes in the work setting and to set realistic
15 goals or make plans independently of others. Tr. 244.

16 Dr. LeBray disagreed with Dr. Zeedyk's GAF of 45 because Dr.
17 Zeedyk was a nontreating source opining on an issue reserved to the
18 Commissioner, and because he thought it too low given Ms. Harvey's
19 activities of daily living. He assessed her GAF at 55. Tr. 245.

20 Anderson and LeBray found insufficient evidence by which to
21 determine whether Ms. Harvey had had episodes of decompensation.
22 Tr. 221, 239.

23 Ms. Harvey continued to receive counseling services from Colin
24 Wood, approximately every two weeks, through August 29, 2002. Tr.
25 253. On many of these visits, she was observed to be calm, relaxed,
26 not depressed. Tr. 276, 279, 280, 281, although there were also
27

1 indications of times when she was feeling anxiety about her son,
2 tr. 268, "anxious and not sleeping well," tr. 275, "crying about
3 little things," tr. 276, or having "difficulty asking questions or
4 confronting authority figures, doctors, etc." Tr. 271. On February
5 12, 2002, she reported feeling anxiety and nervousness; Mr. Wood
6 wrote, "often pulls on hair, smokes too much, withdraws from
7 people, has panic attacks ... gets tight in chest." Tr. 272. On
8 April 23, 2002, she reported nervousness around people, especially
9 strangers or new situations, stating that she "can't think fast,"
10 got "paranoid" and worried that she might say or do the wrong
11 thing." Tr. 267.

12 On April 29, 2002, Mr. Wood wrote a mental health assessment
13 update. Tr. 249. Mr. Wood wrote that Ms. Harvey was considerate of
14 others, very methodical, and working hard to manage her finances
15 and living situation, but that she became uncomfortable with
16 people, got nervous easily, and had mild mental retardation. Tr.
17 250. He also recorded that Ms. Harvey had community support,
18 including several friends and a church community. Id.

19 In Mr. Wood's opinion, Ms. Harvey had a fairly short attention
20 span and a somewhat limited general fund of knowledge. Tr. 251. He
21 noted that she had difficulty with her thought processing and
22 understanding and became anxious when she was around other people.
23 Id.

24 On May 7, 2002, Mr. Wood wrote that Ms. Harvey was "very
25 frightened and anxious" about seeing a dentist. Tr. 265. On June 3,
26 2002, Mr. Wood wrote that Ms. Harvey "came to session crying,
27

1 tearful throughout session, appeared sad, anxious and depressed."
2 Tr. 262. She reported that her anxiety was up, and that she was not
3 sleeping well, smoking more and pulling at hair. Id.

4 _____On June 10, 2002, she was started on Celexa for anxiety. Tr.
5 260-61. On July 22, 2002, Mr. Wood noted that Ms. Harvey's anxiety
6 was decreased, and that the Celexa "seems to be controlling
7 symptoms." Tr. 255. At about that time, she quit smoking.

8 **Hearing Testimony**

9 Ms. Harvey testified that the longest time she ever worked at
10 a job was "a few months," working at a factory making mouse pads.
11 Tr. 318. However, she only worked fulltime at that job for a month.
12 Tr. 319. Ms. Harvey thought she could do the factory job making
13 mouse pads if that job were available to her here, but had "no
14 idea" whether she could sustain the job eight hours a day, five
15 days a week. Tr. 331, 334.

16 She worked as a server in an adult care center for a day, but
17 "ended up being a dishwasher in the back" because taking down what
18 people wanted to eat made her "nervous, very nervous." Tr. 321-22.
19 Ms. Harvey testified that she worked as a cashier at a gas station
20 for about three months in 1998, but she had difficulty counting the
21 money in the till and making change. Tr. 322.

22 Ms. Harvey said she received vocational training at Columbia
23 Gorge Training Center, where she worked for two weeks, five or six
24 hours a day, sorting papers and snipping threads. Tr. 324.

25 Ms. Harvey testified that she reads, but has difficulty
26 remembering what she has read. Tr. 326-27. She cooks for herself
27

1 and cleans house. Tr. 327. Most of her exercise is walking, but she
2 rarely attends any social activities because she has no one to go
3 out with. Tr. 327. She tries to go to church every Sunday, but she
4 sometimes feels uncomfortable there because she gets "scared to
5 participate in things." Tr. 328.

6 Ms. Harvey has no checking account, paying her rent and
7 utilities by means of money orders. Tr. 336-37. She purchases her
8 food with food stamps. Tr. 337.

9 She is currently taking Levoxyl for hypothyroid, Celexa, and
10 Lipitor for high cholesterol. Tr. 332. She testified that the
11 Celexa has helped make her calmer, and that her dosage had recently
12 been increased from 20 mg. to 40 mg. Tr. 332, 334. She is still
13 seeing a therapist, and feels that he is able to calm her. Tr. 332-
14 33.

15 The ALJ called a vocational expert (VE), Patricia Ayerza. The
16 ALJ asked to consider a person who would perform best in a simple,
17 routine, repetitive work environment with no more than infrequent
18 public contact. Tr. 339. The work should not require mathematical
19 proficiency. Id.

20 Ms. Ayerza testified that such an individual could return to
21 Ms. Harvey's prior jobs, including factory worker, bus person, and
22 porter. Tr. 339.

23 The ALJ then asked Ms. Ayerza whether there were other jobs
24 Ms. Harvey could do, and Ms. Ayerza testified that she had the
25 residual functional capacity to work as an agricultural produce
26 sorter, janitor, and laundry worker. Tr. 340-41. Ms. Ayerza
27

1 testified that her testimony was consistent with the Dictionary of
2 Occupational Titles. Tr. 341.

3 On cross examination, Ms. Harvey's attorney asked the VE
4 whether, if Ms. Harvey were unable to do a job that involved time
5 pressure, she would be able to perform the jobs the VE had
6 specified. The VE thought it would "for the most part ... take out
7 ... the local labor, the normal labor market" because jobs without
8 much public contact are, for the most part, "quota kinds of jobs."
9 Tr. 346.

10 **ALJ's Decision**

11 The ALJ found that the medical evidence revealed Ms. Harvey
12 had "borderline intellectual functioning vs. mild mental
13 retardation." Tr. 18.² He also found that the records revealed an
14 impairment of adjustment disorder, but that the records also
15 revealed this disorder is "controlled with medication and there are
16 no vocationally relevant limitations resulting from this disorder."
17 Id. The ALJ concluded that the adjustment disorder did not
18 exacerbate Ms. Harvey's other impairment. Id.

19 The ALJ concluded that Ms. Harvey's borderline intellectual
20 functioning did not met the criteria for any listed disorder and
21 that "the records" further revealed that her mental impairment
22 "results in mild restrictions in her activities of daily living,
23 moderate difficulties in maintaining social functioning and
24 _____

25 ² It appears that the ALJ means Ms. Harvey has borderline
26 intellectual functioning, and not mild mental retardation, but
27 the finding is ambiguous.

1 moderate difficulties in maintaining concentration, persistence and
2 pace. Id. The ALJ found that she had not experienced any episodes
3 of decompensation. Id.

4 With respect to Ms. Harvey's testimony, the ALJ wrote,
5 Careful consideration has been given to the claimant's
6 testimony and it has been found to be credible to the
7 extent she does have an impairment which does cause some
8 limitations, but not to the extent she is completely
9 disabled.

10 Tr. 19. The ALJ rejected Dr. Zeedyk's GAF of 45 and full-scale IQ
11 score of 64, on the ground that when Dr. Zeedyk did her evaluation,
12 Ms. Harvey was recently separated from her husband and functioning
13 independently for the first time, and therefore "not able to
14 adequately cope with the psychosocial stressors normally
15 encountered in independent living in light of her borderline
16 intellectual functioning." Tr. 19-20. However, in the ALJ's
17 opinion, once Ms. Harvey had obtained treatment and began to learn
18 appropriate skills, "she quickly began to improve." Tr. 20.
19 Therefore, the ALJ did not accord great weight to Dr. Zeedyk's
20 opinions "when compared the [sic] longevity and totality of the
21 medical records." Id.

22 The ALJ made a specific finding that Ms. Harvey lacked the
23 residual functional capacity to return to former employment, tr.
24 20, but also made a specific finding that she could perform her
25 prior work as a factory worker, bus person and housekeeper. Tr. 21.
26 In addition, on the basis of the VE's testimony, the ALJ found that
27 Ms. Harvey could work as a laundry worker, agricultural produce
28 worker and janitor. Tr. 20.

Standards

The court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). In determining whether the Commissioner's findings are supported by substantial evidence, the court must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion. Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). However, the Commissioner's decision must be upheld even if "the evidence is susceptible to more than one rational interpretation." Andrews, 53 F.3d at 1039-40.

The initial burden of proving disability rests on the claimant. Meanel, 172 F.3d at 1113; Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995). To meet this burden, the claimant must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which ... has lasted or can be expected to last for a continuous period of not less than 12 months[.]" 42 U.S.C. § 423(d) (1) (A).

A physical or mental impairment is "an impairment that results from anatomical, physiological, or psychological abnormalities

1 which are demonstrable by medically acceptable clinical and
2 laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). This
3 means an impairment must be medically determinable before it is
4 considered disabling.

5 The Commissioner has established a five-step sequential
6 process for determining whether a person is disabled. Bowen v.
7 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520, 416.920.
8 In step one, the Commissioner determines whether the claimant has
9 engaged in any substantial gainful activity. 20 C.F.R. §§
10 404.1520(b), 416.920(b). If not, the Commissioner goes to step two,
11 to determine whether the claimant has a "medically severe
12 impairment or combination of impairments." Yuckert, 482 U.S. at
13 140-41; 20 C.F.R. §§ 404.1520(c), 416.920(c). That determination is
14 governed by the "severity regulation," which provides:

15 If you do not have any impairment or combination of
16 impairments which significantly limits your physical or
17 mental ability to do basic work activities, we will find
18 that you do not have a severe impairment and are,
19 therefore, not disabled. We will not consider your age,
20 education, and work experience.

21 §§ 404.1520(c), 416.920(c). If the claimant does not have a severe
22 impairment or combination of impairments, the disability claim is
23 denied. If the impairment is severe, the evaluation proceeds to the
24 third step. Yuckert, 482 U.S. at 141.

25 In step three, the Commissioner determines whether the
26 impairment meets or equals "one of a number of listed impairments
27 that the [Commissioner] acknowledges are so severe as to preclude
28 substantial gainful activity." Yuckert, 482 U.S. at 140-41. If a
claimant's impairment meets or equals one of the listed

1 impairments, he is considered disabled without consideration of her
2 age, education or work experience. 20 C.F.R. s 404.1520(d),
3 416.920(d).

4 If the impairment is considered severe, but does not meet or
5 equal a listed impairment, the Commissioner considers, at step
6 four, whether the claimant can still perform "past relevant work."
7 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can do so, he
8 is not considered disabled. Yuckert, 482 U.S. at 141-42. If the
9 claimant shows an inability to perform his past work, the burden
10 shifts to the Commissioner to show, in step five, that the claimant
11 has the residual functional capacity to do other work in
12 consideration of the claimant's age, education and past work
13 experience. Yuckert, 482 U.S. at 141-42; 20 C.F.R. §§ 404.1520(f),
14 416.920(f).

15 Discussion

- 16 **1. Did the ALJ fail to consider Ms. Harvey's impairments in**
17 **combination and err in finding that her adjustment**
18 **disorder, hypothyroidism, and migraines did not impose**
vocationally relevant limitations?

19 Ms. Harvey asserts that the ALJ found only that she had the
20 medically determinable severe impairments of "borderline
21 intellectual functioning vs. mild mental retardation," but made no
22 mention of her other diagnosed disorders, including hypothyroidism,
23 depression and migraines. The Commissioner argues that Ms. Harvey
24 did not identify hypothyroidism or migraine headaches as conditions
25 that limited her ability to work, and that the medical evidence
26 establishes that her hypothyroidism is well-controlled by
27 medication. I agree. Although chart notes indicate the presence of

1 hypothyroidism and complaints about headaches, there is no
2 indication that Ms. Harvey's hypothyroidism is not controlled by
3 medication, and no indication that the headaches were treated with
4 medication. There is also substantial evidence that Ms. Harvey's
5 depression and anxiety were eventually controlled with Celexa.

6 However, I agree that the ALJ erred with respect to the
7 diagnoses of adjustment disorder or other personality disorders.
8 Although the ALJ found that Ms. Harvey had an adjustment disorder,
9 he concluded that it was controlled with medication, there were "no
10 vocationally relevant limitations resulting from this disorder,"
11 and it did "not exacerbate the claimant's other impairment." Ms.
12 Harvey argues that the ALJ gave no explanation of how he arrived at
13 this conclusion, and that it is not proper for the ALJ to make such
14 unsupported conclusions, especially because under the regulations,
15 he was required to recontact any of Ms. Harvey's treating sources
16 for explanations of how her mental disorders interact, 20 C.F.R. §
17 416.912, and because he did not request the assistance of a medical
18 expert at the hearing.

19 I agree with Ms. Harvey that the ALJ's conclusion is
20 unexplained and unsupported by any medical evidence in the record.
21 Indeed, there is evidence in the record from which it can be
22 inferred that Ms. Harvey's adjustment disorder or the personality
23 disorders found by Doctor Etcoff did impose vocationally relevant
24 limitations and did exacerbate her impairment of mild mental
25 retardation. See, e.g., tr. 141 (opinion of psychiatrist Dr. Harris
26 that Ms. Harvey's long-standing personality deficit, augmented by
27

1 her learning disability, made her unable to get any job "above the
2 barest of minimal");³ tr. 128 personality testing given by Dr.
3 Etcoff showing elevated clinical personality scales (dependent,
4 self-defeating, avoidant and passive-aggressive) and indications of
5 two severe personality pathologies (borderline and paranoid); tr.
6 130 (Dr. Etcoff's conclusion that Ms. Harvey would need services
7 "of some kind" due to the fact that "she will not likely be able to
8 hold down a job and function unassisted in the community").
9 Moreover, there is no evidence in the record that adjustment
10 disorder or personality disorders can be controlled with
11 antidepressants and anti-anxiety agents such as Celexa. While there
12 is evidence that Celexa was intended to treat the anxiety and was
13 helpful in doing so, the record is silent on whether Celexa was
14 intended to have, or had, any impact on her personality disorder or
15 the adjustment disorder. I agree with Ms. Harvey's assertion that
16 medical expert testimony is needed on this issue, and recommend
17 that the case be remanded for that purpose.

18 **2. Did the ALJ err by failing to find that Ms. Harvey's**
19 **condition met Listing 12.05: Mental Retardation?**

20 Ms. Harvey asserts that the ALJ erred by finding that her
21 condition does not meet the listing for mental retardation, 20
22 C.F.R. § 404, Subpart P, Appendix 1, Listing 12.05(C). That Listing
23 provides, in relevant part:

24 The required level of severity for this disorder is met
25 when the requirements in A, B, C, or D are satisfied.

26 ³ This comment may have some implications on the issue of
27 whether Ms. Harvey is totally disabled.

1 * * *
2 C. A valid verbal, performance, or
3 full scale IQ of 60 through 70 and a
4 physical or other mental impairment
 imposing an additional and
 significant work-related limitation
 of function.

5 Ms. Harvey argues that she meets the listing because Dr. Zeedyk
6 found that she had a full scale IQ of 64,⁴ based not only on raw
7

8 ⁴ Ms. Harvey takes issue with the ALJ's rejection of Dr.
9 Zeedyk's testing results in favor of those of Dr. Etcoff. I agree
10 with her contention that the ALJ's acceptance of Dr. Etcoff's
11 test results over those of Dr. Zeedyk was inappropriate because
12 1) Dr. Etcoff used an outmoded version of the Wechsler Adult
13 Intelligence Scale (the WAIS-R was superseded by the WAIS-III in
14 October 1997, before Dr. Etcoff administered the WAIS-R), see The
15 Psychological Corporation, WAIS-III Technical Manual (EDS) (San
16 Antonio, 1997); and 2) Dr. Etcoff used a partial version of the
17 WAIS-R while Dr. Zeedyk administered the entire WAIS-III.
18

19 I also agree with Ms. Harvey that the ALJ's explanation for
20 rejecting Dr. Zeedyk's findings was inadequate. The ALJ
21 apparently attributed Ms. Harvey's IQ test results to being
22 unable to cope with psychosocial stressors, finding that she
23 "began to improve" once she obtained treatment, and concluding
24 that Dr. Zeedyk's opinions were not entitled to great weight
25 "when compared [with] the longevity and totality of the medical
26 records." The ALJ's finding that Ms. Harvey's IQ "began to
27

1 scores, but on her extremely low percentile rankings across a
2 variety of subtests and her demonstrated inability to live on her
3 own and make decisions for herself.

4 The Commissioner counters that Ms. Harvey failed to carry her
5 burden of proving that she met or equaled a Listing 12.05C because
6 the ALJ properly rejected Dr. Zeedyk's finding that she had an IQ
7 in the 60-70 range, and she failed to establish the existence of
8 another severe impairment. With respect to the failure to prove the
9 existence of another severe impairment, the Commissioner points to
10 evidence in the record that Ms. Harvey was able to manage her own
11 funds, complete her activities of daily living, socialize with
12 others, work for short periods of time, and take medication without
13 assistance.

14 As discussed above, I conclude that the evidence is not fully
15 developed on the question of whether, even accepting Dr. Zeedyk's
16 finding that Ms. Harvey's full scale IQ was 64, her other mental
17 impairment or impairments-- i.e., the adjustment disorder and/or
18 the personality disorders-- imposed a significant work-related

20 improve" after she obtained mental health treatment is
21 unsupported by any medical evidence. The ALJ's rejection of Dr.
22 Zeedyk's findings on the basis of "the longevity and totality" of
23 unspecified medical records is legally inadequate. See Holohan v.
24 Massinari, 246 F.3d 1195, 1205 (9th Cir. 2001) (general findings
25 such as "the record in general" indicates improvement are
26 insufficient as a matter of law).

1 limitation of function. I recommend that this case be remanded for
2 development of the record on this issue.

3 **3. Did the ALJ fail to consider equivalence at Step 3?**

4 Ms. Harvey contends that the ALJ failed to explain his finding
5 that her impairments did not, singly or in combination, meet or
6 equal a listing at Step 3; she points out that his only analysis of
7 this issue was the statement, "No treating or examining physician
8 has mentioned findings equivalent in severity to the criteria of
9 any listed impairment."

10 If "medical findings are at least equal in severity and
11 duration to the listed findings," a finding of medical equivalence
12 to a listed impairment is justified. 20 C.F.R. § 416.926. Ms.
13 Harvey argues that this means the symptoms, signs and laboratory
14 findings that pertain to her condition must be compared with the
15 criteria of the listed impairment.

16 The Commissioner asserts that the ALJ considered the combined
17 effects of all her impairments because his residual functional
18 capacity assessment limited her to simple work and limited public
19 contact.

20 I agree that the ALJ failed to develop the record by eliciting
21 medical testimony on the question of whether the symptoms of Ms.
22 Harvey's adjustment disorder and/or personality disorders were
23 functionally equivalent to the Listing 12.05(C) requirement of a
24 physical or other mental impairment imposing an additional and
25 significant work-related limitation of function. I disagree with
26 the Commissioner that the mere inclusion of simple work and limited
27

1 public contact in the residual functional capacity assessment
2 constitutes a finding of no medical equivalence. I recommend that
3 the case be remanded for additional medical testimony and findings
4 on this issue.

5 **4. Was the ALJ's hypothetical to the VE incomplete?**

6 For the testimony of a VE to be considered reliable, the
7 hypothetical posed to the VE by the ALJ must include all of the
8 claimant's functional limitations, both physical and mental, that
9 are supported by the record. Thomas v. Barnhart, 278 F.3d 947, (9th
10 Cir. 2002). If the hypothetical does not reflect all of a
11 claimant's limitations, the VE's testimony has insufficient
12 evidentiary value to support a finding that the claimant can
13 perform jobs in national economy. Matthews v. Shalala, 10 F.3d 678
14 (9th Cir. 1993).

15 Ms. Harvey argues that the ALJ's residual functional capacity
16 analysis was necessarily incomplete because of the ALJ's failure,
17 discussed above, to consider her impairments in combination. She
18 also argues that the ALJ's failure to include in his hypothetical
19 question to the VE specific limitations of fatigue (the result of
20 her unstable hypothyroidism), and deficiencies of concentration,
21 persistence or pace, as found by Dr. Anderson and Dr. LeBray,
22 deprives the VE's opinions of evidentiary value sufficient to
23 support his finding that Ms. Harvey retained the residual
24 functional capacity to do work existing in the national economy.

25 A finding that a claimant has "moderate" deficiencies of
26 concentration, persistence or pace represents a "severe" limitation
27

1 under Social Security regulations. 20 C.F.R. § 404.1520a(d)(1).
2 Deficiencies of concentration, persistence or pace are not
3 adequately represented in a hypothetical that merely limits the
4 claimant to simple jobs, as the ALJ did in this case. Thomas, 278
5 F.3d at 956 (citing Newton v. Chater, 92 F.3d 688, 695 (8th Cir.
6 1996)).

7 Ms. Harvey challenges the ALJ's step five determination on
8 another ground, which is that he improperly disregarded testimony
9 elicited from the VE by her counsel that she was unemployable in a
10 competitive labor market because of evidence in the vocational
11 assessment that she needed a job coach and was unable to do a job
12 that involved time pressure. The evidence that Ms. Harvey needed a
13 job coach is, as the Commissioner points out, equivocal; Ms.
14 Gettman merely opined that Ms. Harvey "would benefit from having
15 consistent follow-up with an advocate who could help her problem
16 solve any issues ... related to her learning the job." However,
17 there was substantial evidence in the record that Ms. Harvey was
18 limited to jobs that did not impose time pressure, and the VE
19 acknowledged that because Ms. Harvey was limited from public
20 contact, the jobs available to her were "quota kinds of jobs." I
21 agree that the ALJ's failure to consider this evidence further
22 weakens the step five analysis.

23 I conclude that the VE's testimony was insufficient to support
24 the ALJ's step five finding, and recommend that the case be
25 remanded for a more complete and accurate hypothetical to the VE.

26 5. Remand

1 Ms. Harvey asserts that the Commissioner's decision should be
2 reversed and that she should be found disabled as alleged.
3 Alternatively, she urges the court to consider a remand for further
4 proceedings, with instructions.

5 The decision whether to remand for further proceedings turns
6 upon the likely utility of such proceedings, and is a matter of
7 judicial discretion. Harman v. Apfel, 211 F.3d 1172, 1177, 1179 (9th
8 Cir. 2000). In Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996),
9 the court held that improperly rejected evidence should be credited
10 and an immediate award of benefits be made when: 1) the ALJ has
11 failed to provide legally sufficient reasons for rejecting such
12 evidence, 2) there are no outstanding issues that must be resolved
13 before a determination of disability can be made, and 3) it is
14 clear from the record that the ALJ would be required to find the
15 claimant disabled were such evidence credited.

16 I am not persuaded that the Smolen test is satisfied. The
17 outstanding issues to be resolved before a determination of
18 disability can be made in this case are 1) whether Ms. Harvey's
19 adjustment disorder and/or personality disorders constitute severe
20 impairments; 2) if not, whether they satisfy, or are functionally
21 equivalent to, another severe impairment, which would satisfy the
22 requirements of Listing 12.05(C) and 3) whether Ms. Harvey's low IQ
23 and other impairments preclude her from engaging in work that
24 exists in the national economy.⁵

25
26 ⁵The ALJ's finding that Ms. Harvey could return to her past
27 relevant work is, as discussed, contradicted by his finding that

1 I recommend that this case be reversed and remanded for
2 further proceedings.

3 **Scheduling Order**

4 The above Findings and Recommendation will be referred to a
5 United States District Judge for review. Objections, if any, are
6 due November 2, 2005. If no objections are filed, review of the
7 Findings and Recommendation will go under advisement on that date.
8 If objections are filed, a response to the objections is due
9 November 16, 2005, and the review of the Findings and
10 Recommendation will go under advisement on that date.

11
12
13 Dated this 18th day of October, 2005.

14
15 /s/ Dennis James Hubel

16 Dennis James Hubel
17 United States Magistrate Judge
18
19
20
21

22 _____
23 she had not engaged in substantial gainful activity since her
24 alleged onset date and by the uncontradicted evidence in the
25 record that none of Ms. Harvey's various jobs constituted
26 substantial gainful activity because her earnings were
27 insufficient and she did not remain in the jobs long enough.